

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

SAINT XAVIER UNIVERSITY,)	
)	
Employer;)	
)	Case No. 13-RC-22025
and)	
)	
ST. XAVIER UNIVERSITY ADJUNCT)	
FACULTY ORGANIZATION, IEA-NEA,)	
)	
Petitioner.)	

**SAINT XAVIER UNIVERSITY’S REQUEST FOR REVIEW
OF THE REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION**

HOGAN LOVELLS US LLP
Stanley Brown
David Baron
875 Third Avenue
New York, New York 10022
Telephone: (212) 918-3000
Facsimile: (212) 918-3100
stanley.brown@hoganlovells.com
*Attorneys for Employer Saint Xavier
University*

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	3
RELEVANT FACTS	4
ARGUMENT	19
I. THE <i>PACIFIC LUTHERAN UNIVERSITY</i> TEST IS CONSTITUTIONALLY INFIRM AND SHOULD BE DISCARDED IN FAVOR OF THE <i>GREAT FALLS</i> TEST, WHICH SAINT XAVIER EASILY MEETS	19
A. The <i>PLU</i> Test Is Unconstitutional And Should Be Discarded	19
B. Saint Xavier Meets The <i>Great Falls</i> Test	25
II. THE REGION ERRED IN ASSERTING JURISDICTION OVER THE PETITIONED-FOR UNIT UNDER <i>PACIFIC LUTHERAN UNIVERSITY</i>	25
III. IN THE ALTERNATIVE, THE REGION ERRED IN FAILING TO ORDER A NEW ELECTION	31
CONCLUSION	35

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Carroll Coll., Inc. v. NLRB</i> , 558 F.3d 568 (D.C. Cir. 2009)	2
<i>Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos</i> , 483 U.S. 327 (1987)	22
<i>Grace Line, Inc.</i> , 4 NLRB 763 (1938)	34
<i>Hernandez v. Comm’r of Internal Revenue</i> , 490 U.S. 680 (1989)	22
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000)	22
<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979)	passim
<i>Pacific Lutheran University</i> , 361 NLRB No. 157 (Dec. 16, 2014)	passim
<i>Town of Greece v. Galloway</i> , 134 S. Ct. 1811 (2014)	22
<i>Univ. of Great Falls</i> , 331 NLRB No. 188 (Aug. 31, 2000)	20
<i>Univ. of Great Falls v. NLRB</i> , 278 F.3d 1335 (D.C. Cir. 2002)	passim
<i>Universidad Cent. de Bayamon v. NLRB</i> , 793 F.2d 383 (1985)	2, 23, 24
<i>W. Union Telegraph Co.</i> , 38 NLRB 483 (1942)	34
OTHER AUTHORITIES	
NLRB Casehandling Manual, Part 2, Representation Proceedings	33
Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2000)	25
29 C.F.R. 102.67(c)	1

Pursuant to Sections 102.67(b) & (c) of the National Labor Relations Board Rules and Regulations and the June 1, 2015 Supplemental Decision and Order issued by Region 13 in this matter (the “June 1 Order”), Saint Xavier University (“Saint Xavier” or “Employer”), by its attorneys, Hogan Lovells US LLP, hereby requests review of the June 1 Order. Review is necessary because there are compelling reasons for the Board to reconsider the important rule it announced in *Pacific Lutheran University*, 361 NLRB No. 157 (Dec. 16, 2014) (“*PLU*”). See 29 C.F.R. 102.67(c)(4). Review is further necessary because (a) the Board’s decision in *PLU* is the only application of that rule, and thus there is a dearth of officially reported Board precedent applying that rule, and (b) the Region departed from the Board’s decision in *PLU* in asserting jurisdiction over Saint Xavier. See 29 C.F.R. 102.67(c)(1).

PRELIMINARY STATEMENT

On December 16, 2014, the National Labor Relations Board (“Board” or “NLRB”) announced in *PLU* a new standard for assessing jurisdiction over religious institutions of higher education such as Saint Xavier. In doing so, the Board discarded its constitutionally infirm “substantial religious character” test and replaced it with a test asking whether a religious university (1) holds itself out as providing a religious educational environment (“Prong 1”), and (2) holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the university’s religious educational environment (“Prong 2”). But the *PLU* test does not remedy the constitutional deficiencies in the Board’s jurisdictional analysis. Rather, it perpetuates the impermissible entanglement of its predecessor by licensing the Board to determine in the first instance what is or is not “religious function,” and then to judge whether a religious college or university sufficiently holds out its faculty members, individually or collectively, as performing that function. Saint Xavier respectfully submits that the Board can

and should avoid entangling itself in Saint Xavier’s religious beliefs by assessing jurisdiction not under *PLU*, but under the constitutionally permissible test articulated by the U.S. Court of Appeals for the D.C. Circuit in *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002) and reaffirmed in *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009) (the “*Great Falls Test*”). *See also* *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 402 (1985) (Breyer, J.) (the Board “cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court or Labor Board ‘entanglement’ as they are administered”).

Notwithstanding the constitutional infirmities of the *PLU* Test, and contrary to the June 1 Order, Saint Xavier meets the *PLU* Test. The Region correctly found that Saint Xavier meets Prong 1 of the *PLU* Test; however, it erroneously found that Saint Xavier does not meet Prong 2. Saint Xavier meets Prong 2 by consistently communicating to its entire community—including its adjunct faculty—that being a faculty member at Saint Xavier is different than at secular institutions because Saint Xavier faculty members are expected to maintain the University’s religious educational environment by understanding, appreciating, and supporting its religious educational mission. Saint Xavier makes this expectation known in job descriptions, job interviews, orientation programs, public writings and speeches given by Saint Xavier’s leadership, and countless other documents and programs. The obligation of faculty at a Catholic university like Saint Xavier to respect and be committed to the institution’s religious mission is also a fundamental part of the apostolic constitution, *Ex Corde Ecclesiae* (“*Ex Corde*”), given by Saint Pope John Paul II in 1990, and the Application of *Ex Corde Ecclesiae* for the United States (“Application”), promulgated by the U.S. Conference of Catholic Bishops.

For these reasons and as set forth more fully below, the *PLU* Test is constitutionally impermissible. The Board should discard it in favor of the *Great Falls* Test, which Saint Xavier easily meets. In the alternative, should the Board again fail to adopt the *Great Falls* Test, it should find that Saint Xavier meets the *PLU* Test, vacate the June 1 Order, and decline jurisdiction over Saint Xavier.

PROCEDURAL HISTORY

The Illinois Education Association (“Union” or “Petitioner”) filed a petition on April 12, 2011, seeking to represent a unit of all part-time faculty at Saint Xavier’s Chicago Campus or Orland Park Campus who teach at least three credit hours per semester. The parties stipulated that the petitioned-for unit is an appropriate unit (Tr. 20), but Saint Xavier contested the Board’s jurisdiction over it as a religious institution.

The Region initially held a hearing on the jurisdictional issue on April 28, April 29, and May 2 of 2011. At that time, the Board assessed jurisdiction over religious universities like Saint Xavier under the so-called “substantial religious character” test, which the Board developed following the U.S. Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). By Decision and Direction of Election dated May 26, 2011, the Regional Director found it appropriate to assert jurisdiction over Saint Xavier under the substantial religious character test and directed an election to be held. Saint Xavier timely filed a Request for Review with the Board on June 9, 2011. A mail ballot election was completed on July 13, 2011, and the ballots were impounded following the close of voting.

Nearly three and one half years later, on December 16, 2014, the Board in *PLU* discarded its constitutionally infirm substantial religious character test and articulated a new standard whereby it would decline jurisdiction over a religious university if the university: (1) makes a

minimal showing that it holds itself out as providing a religious educational environment, and then (2) demonstrates that it holds out faculty in the petitioned-for unit as performing a specific role in creating or maintaining that religious educational environment. *PLU*, at *1. By Order dated February 3, 2015, the Board remanded the instant case back to the Region for reconsideration under *PLU*. On February 20, 2015, Saint Xavier requested a second hearing. The Region granted Saint Xavier's request by Order dated March 9, 2015 and held a second hearing on April 7 and April 8, 2015.

The parties filed post-hearing briefs. Saint Xavier argued in its brief that (a) the Board should discard the *PLU* Test in favor of the *Great Falls* Test, (b) in any event Saint Xavier met the *PLU* Test, and (c) in the alternative the Region should order a new election because Saint Xavier did not have an opportunity in 2011 to segregate and challenge votes based on the newly minted *PLU* Test. By Supplemental Decision and Order dated June 1, 2015 (the "June 1 Order"), the Region held that Saint Xavier met Prong 1 of the *PLU* Test, but not Prong 2, and ordered that the ballots previously impounded be counted. The June 1 Order does not address Saint Xavier's request for a new election.

RELEVANT FACTS

Saint Xavier University, established by the Sisters of Mercy in 1846, is the oldest Catholic university in Chicago. (*See* Er. Ex. 14; Er. Ex. 17 at 1–2; *see also* Saint Xavier's June 9, 2011 Request for Review of the Regional Director's Decision and Direction of Election ("2011 RFR"), at 2–4.) The Sisters of Mercy is a Catholic religious order founded by Mother Mary Catherine McAuley in 1831. (*Id.*) The Sisters of Mercy, as the founding sponsor of the University, retains reserved powers as the University's sole corporate member and otherwise

maintains a close relationship with Saint Xavier. (Tr. 49, 53–56, 67; Er. Exs. 7, 8. *See also* 2011 RFR, at 5–6.)

Saint Xavier is a Catholic institution of higher education. (*E.g.*, Er. Ex. 1; Tr. 736.) Catholic higher education, in turn, is “education within a religious context” and “a search for truth that . . . culminates in the understanding and in the underpinning that Jesus Christ is the source of all truth.” (Tr. 985; Er. Ex. 33, at 1 (“A Catholic University's privileged task is to unite existentially by intellectual effort two orders of reality that too frequently tend to be placed in opposition as though they were antithetical: the search for truth, and the certainty of already knowing the fount of truth.”).) As a Catholic institution of higher education, Saint Xavier “intentionally works to fulfill the educational mission of the Church.” (Tr. 738.) That mission is to provide education “in a context where the free study of religion and religious perspectives is built right into the curriculum.” (*Id.*) Thus, Saint Xavier “promotes a vigorous dialogue between faith and reason” and asserts that “Catholic teaching, especially the dialogue between faith and reason and the Church’s social justice tradition, undergirds the University’s mission and values.” (Tr. 617; *see also*, Er. Ex. 50, at 4.) If Saint Xavier did not pursue a religious educational mission, it could not be deemed Catholic. (*E.g.*, Tr. 27, 738, 742–43.)

Saint Xavier expresses and promotes its religious educational environment in many ways. For example, Saint Xavier’s mission statement, displayed prominently on its website and in other documents, emphasizes its Catholic and Mercy mission: “Saint Xavier University, a Catholic institution inspired by the heritage of the Sisters of Mercy, educates men and women to search for truth, to think critically, to communicate effectively, and to serve wisely and compassionately in support of human dignity and the common good.” (*E.g.*, Er. Ex. 4; Er. Ex. 53, at 1; Pet. Ex. 20, at 10.) Saint Xavier’s Philosophy Statement, also widely published, states, *inter alia*, that (i)

the University’s “distinctive qualities and values . . . includ[e] the belief that faith and reason can interact in mutually fruitful ways;” (ii) the University “encourages a full search for truth, including religious truth;” and (iii) the University seeks to “promote[] a vigorous and compassionate dialogue among the various faith traditions, and between them and the academic disciplines.” (*E.g.*, Er. Ex. 22, at 1; Er. Ex. 53, at 2; Pet. Ex. 20, at 10.)

Saint Xavier also expresses its religious educational environment through its membership in the Association of Catholic Colleges and Universities, its inclusion as a Catholic University in the Official Catholic Directory, and its motto of “*Via, Veritas, Vita*”—meaning “the Way, the Truth, the Life”—a description of Jesus Christ that derives from Gospel of John 14:6. (Er. Ex. 1; Er. Ex. 22, at 8, 10; Tr. 25–27.) Saint Xavier further expresses its Catholic and Mercy heritage through signs, symbols, art, and memorials displayed prominently throughout its campus—including crucifixes of Jesus Christ in every classroom. (Tr. 131–32, 503, 530–31; Er. Ex. 19.) Saint Xavier also holds University-wide liturgical ceremonies and offers programs—including but not limited to lecture series, alternative spring break trips, radio programs, discussion programs, and mentoring programs—that reinforce its religious educational environment. (Er. Exs. 45–47; 2011 RFR, at 12–21 (citing testimony and exhibits); *see also infra*.) Even Saint Xavier’s accreditation depends on its staying true to its Catholic mission. (Tr. 808, 810, 812.) The accreditation process is “driven by mission,” as it requires Saint Xavier to “report[] how it continues to express the educational mission of the Church.” (Tr. 808, 979.) If Saint Xavier cannot demonstrate “how it expresses itself as a Catholic institution, . . . it is not going to be accredited as Saint Xavier University.” (Tr. 810.)

Saint Xavier’s entire faculty—including its adjunct faculty—has a fundamental responsibility to maintain the University’s religious educational environment. (*E.g.*, Tr. 598.)

Saint Xavier intends to be “a place of faith where faith is experienced and expressed, where faith is honored, and [where] everyone has to operate within that context”—including faculty in all disciplines. (Tr. 660.) Saint Xavier believes that truth is being pursued in every classroom and therefore that “there’s a religious activity going on [in every classroom] because the pursuit of truth ultimately leads to the source of truth who we understand to be God.” (Tr. 643–44.) Thus, Saint Xavier’s undisputed public position is that its religious educational mission “is everyone’s responsibility” and serves as a “summons” to “every member” of the Saint Xavier community—including faculty—that requires “action, implementation, and advocacy.” (Er. Ex. 52, at 79; Er. Ex. 63; Tr. 785, 1003–04.) Saint Xavier has its faculty specifically in mind when making these statements because its teachers are the primary conduit of Saint Xavier’s mission to its students. (*E.g.*, Tr. 595, 645, 999; *see also* Tr. 590 (“[W]e’re very cognizant of the fact that students spend the major part of their time at Saint Xavier in the classroom, and that those who make the major impact on them are going to be their teachers.”).) Indeed, “the University lives through its faculty [and] wouldn’t exist without a faculty.” (Tr. 595.) Of note, Saint Xavier’s faculty helped to draft its current mission statement. (Tr. 46.)

The importance of Saint Xavier’s faculty to its religious educational mission does not come just from within Saint Xavier—it is mandated by *Ex Corde*, which “frames the conversation for . . . the confluence between the Catholic identity and institutional autonomy” of Catholic institutions of higher education worldwide. (Er. Ex. 33; Tr. 90, 989.) According to *Ex Corde*, “[a]ll teachers . . . at the time of their appointment are to be informed about the Catholic identity of the institution and its implications and about the responsibility to promote or at least to respect that identity.” (Er. Ex. 33 (emphasis added); Tr. 880.) *Ex Corde* also states, “The responsibility for maintaining and strengthening the Catholic identity of the University . . . is

shared in varying degrees by all members of the university community, and therefore calls for the recruitment of adequate university personnel, *especially teachers* and administrators, who are both willing and able to promote that identity.” (Er. Ex. 33, Art. 4.1 (emphasis added).) It further states that *all teachers*, Catholic or otherwise, are “to respect Catholic doctrine and morals in their research and teaching” and “to recognize and respect the distinctive Catholic identity of the University.” (*Id.* at Arts. 4.3 & 4.4.) Saint Xavier follows *Ex Corde*, as it must. (Tr. 90, 306–07, 427, 758–762, 990; Er. Ex. 40.) To find that Saint Xavier does not hold adjunct faculty out as performing a religious function, as the Region has done, is to accuse Saint Xavier of departing from *Ex Corde*, the apostolic constitution (the highest form of papal decree) governing Catholic higher education throughout the world.

The primary role of faculty in Saint Xavier’s religious educational mission is also required by the Application, which is “particular law” promulgated by the U.S. Conference of Catholic Bishops, effective May 3, 2001, to apply *Ex Corde* to the U.S. Catholic church and U.S. Catholic institutions of higher education. (Er. Ex. 48; Tr. 759.) For example, according to the Application:

“The responsibility for safeguarding and strengthening the Catholic identity of the university rests primarily with the university itself. All the members of the university community are called to participate in this important task in accordance with their specific roles: the sponsoring religious community, the board of trustees, the administration and staff, *the faculty*, and the students. Men and women of religious faiths other than Catholic . . . *on the faculty* . . . can make a valuable contribution to the university. Their presence affords the opportunity for all to learn and benefit from each other.”

(Er. Ex. 48, Art. 4.1 (emphasis added).) The Application also mandates, “*All professors* are expected to be aware of and committed to the Catholic mission and identity of their institutions.” (*Id.*, Art. 4.4.a (emphasis added).) Thus, faculty members must “understand that when they

accept a position [at Saint Xavier] that they are accepting a position as a Catholic institution.” (Tr. 994.) Finally, the Application requires, “*All professors* are expected to exhibit not only academic competence and good character but also respect for Catholic doctrine.” (Er. Ex. 48, Art. 4.4.b (emphasis added).) Accordingly, faculty members at Saint Xavier must treat Catholic doctrine with dignity and may not “act in denigration” of it. (Tr. 995–96.) If an adjunct faculty member acted contrary to this expectation, for example by denigrating Saint Xavier’s religious educational mission, Saint Xavier would review his or her statements carefully, consistent with the principles of academic freedom, and, depending on the circumstances, might not invite that faculty member to teach the next semester. (Tr. 755–57, 992, 993–96, 1008–09, 1024.) Petitioner’s own witness, James Kollros, a long-employed adjunct faculty member in the history department, corroborated this testimony by acknowledging there would be consequences if he denigrated Saint Xavier’s religious educational mission. (Tr. 1059–60.)

In keeping with *Ex Corde*, the Application, and Saint Xavier’s own institutional autonomy pursuant to those documents (Er. Ex. 33, ¶ 12.), Saint Xavier takes what it deems to be appropriate measures to ensure that its faculty is aware of and committed to its responsibility to maintain Saint Xavier’s Catholic identity. (Tr. 994–95.) One way is by “hiring for mission,” which at Saint Xavier means hiring individuals “who will appreciate the impact of [its] religious educational mission.” (Tr. 1005.) Importantly, “hiring for mission” is “not a litmus test”—it is a concept that Catholic higher education institutions have debated since the promulgation of *Ex Corde* in 1990. (Tr. 1005–06.) The Region’s finding that Saint Xavier does not meet Prong 2 of the *PLU* Test is to say that Saint Xavier does not effectively hire for mission. In this way, the Region purports to be in a position to enter this decades-old debate, even though, given the First Amendment of the U.S. Constitution and the doctrine of constitutional avoidance, it is not.

The June 1 Order notwithstanding, Saint Xavier affirmatively works to advance its goal of hiring for mission in many ways. For example, before adjunct faculty candidates even apply for a position at Saint Xavier, Saint Xavier’s public job descriptions notify them that Saint Xavier was “[f]ounded by the Sisters of Mercy in 1846” as “the first mercy College in the United States and is Chicago’s oldest Catholic university.” (Er. Exs. 58 & 59; Tr. 883–86.) Importantly, Saint Xavier also informs candidates (literally in bold font) that one of the job requirements is to have an “[u]nderstanding of and appreciation for the Catholic identity and Mercy heritage of the University.” (*Id.*)¹ The inclusion of this language directly “emanates” from *Ex Corde* and is an attempt to ensure that the University’s identity as a Catholic Mercy institution “permeates all of [Saint Xavier’s] employees” and that this understanding is “brought to the front” “for all hiring and all faculty.” (Tr. 887, 974.) University officials also inform adjunct faculty candidates of their role in maintaining Saint Xavier’s religious educational environment during their job interviews, where they are expected to be able to speak to Saint Xavier’s Catholic mission and identity, how that mission and identity would affect their teaching and scholarship, and how they would advance that mission and identity. (Tr. 751–52, 870–73, 886–88, 1007.) If a faculty candidate were unable to do so, Saint Xavier would likely not hire that individual. (Tr. 872, 888, 1008–09.)² In fact, Saint Xavier witnesses identified at least two

¹ Petitioner entered faculty job descriptions posted on third-party websites; Petitioner’s counsel then improperly offered her own testimony that these descriptions “do not include the information with respect to the mission statement.” (Tr. 906–12.) This attempt failed, as Petitioner’s counsel’s testimony is patently wrong. The adjunct faculty job posting that Petitioner entered into evidence contains the same language as the postings on Saint Xavier’s website, and the other third-party postings (none of which are for faculty) also contain language alerting candidates to their expected role with respect to Saint Xavier’s Catholic and Mercy identity. (Pet. Ex. 16; Tr. 972–76.)

² Dr. Paul DeVito, Saint Xavier’s Provost, testified that when he was interviewed for his position in 2013, he was specifically asked “very pointed questions” about how he would ensure that faculty candidates were able to support Saint Xavier’s religious educational mission. (Tr. 889–90.) Appropriately, this portion of his interview took place in Saint Xavier’s McDonough Chapel. (Tr. 890.)

occasions when Saint Xavier did not hire faculty candidates because of their apparent inability to serve their expected religious functions. (Tr. 753–54, 1009–10.) On a third occasion, an existing faculty member expressed concern with having a crucifix in her classroom and then voluntarily left the University. (Tr. 503.)³

Saint Xavier reminds new adjunct faculty members of their religious function at or around the time of their hire. For example, prior to each semester, Saint Xavier directs adjunct faculty members to a Faculty Resources Manual, which provides important information about, among other things, Saint Xavier’s Catholic identity and Mercy heritage.⁴ (Er. Ex. 53.) The Faculty Resources Manual leads with a recitation of Saint Xavier’s Mission Statement, Philosophy Statement, “Vision of Our Catholic and Mercy Identity,” and Mercy Heritage. (*Id.* at 1–6.) Later, the Faculty Resources Manual states:

“As a Catholic University, we profess faith in God and in Jesus Christ, his son. That’s our foundation and the heart of the Mercy tradition that animates us. But that same tradition requires we open wide our arms to all who seek God. So, all are welcome here because this is a place where faith is valued and nurtured. Some don’t identify with a specific faith but see themselves as seekers; we welcome

³ The Region appears to rely on the fact that there is no evidence in the record of an adjunct faculty member being disciplined for denigrating the Catholic faith. Order at 8. This fact is irrelevant: The record shows that Saint Xavier takes great measures to hire faculty members who will not engage in such conduct, and indeed has not hired candidates who were perceived as unable to further Saint Xavier’s religious function. (Tr. 753–54, 1009–10.) That it has been successful in doing so cannot be held against it. Indeed, while purporting to follow the Board’s “holding out” test in *PLU*, the June 1 Order shows that the Region required examples of Saint Xavier’s actual application to faculty of its policies regarding its religious educational mission in order to prevail. *PLU* makes no such requirement.

⁴ An appointment letter sent to each adjunct faculty member prior to each semester in which he or she teaches directs him or her to the Faculty Resources Manual. (Tr. 875–78; Er. Exs. 56, 57.) Marie Cassidy, an adjunct art instructor who testified for the Petitioner, said she had never seen the Faculty Resources Manual. (Tr. 832.) However, the record is clear that Ms. Cassidy received the same offer letter as other adjunct faculty members at the start of each semester in which she taught, and that her offer letters contained a link to the Faculty Resources Manual. (Er. Ex. 57; Tr. 877–78.) In addition, Ms. Cassidy testified that she does not have time to read her Saint Xavier e-mails. (Tr. 841–42.) She also testified that she is aware that Saint Xavier is a Catholic institution, aware of its mission and philosophy, aware that it has crucifixes in its classrooms, and aware that classes were recently cancelled for Holy Thursday. (Tr. 840, 842, 850–51.) Finally, Ms. Cassidy testified that she has no idea what other adjunct faculty members (or anyone else) might be doing at Saint Xavier. (Tr. 852.) Ms. Cassidy is not a reliable or informative witness on the jurisdictional issue.

them as well, because our mission is to walk with anyone who seeks that which is greater than themselves.”

(*Id.* at 29.) The Faculty Resources Manual then proceeds to explain that “it is our task and responsibility to invite all to see themselves as carriers of that mission, which sees all learning as essentially ‘religious’ in the sense that contact with and awareness of the good, the true, and the beautiful reveals the creator who is the source and destination of all human striving.” (*Id.*) This statement is “especially mindful of [the] faculty to whom the document is addressed because . . . they’re the ones who facilitate this kind of experience for our students primarily.” (Tr. 645.)

Saint Xavier also informs adjunct faculty members about their role in Saint Xavier’s Catholic mission and identity during an orientation program prior to the academic year. (Tr. 611.) In August 2014 Dr. Graziano Marcheschi, Saint Xavier’s Vice President of Mission and Ministry, opened the adjunct faculty orientation program with a prayer in which he stated, “We are a faith-based institution and all that we do flows from the energy we get from that faith. And so we like to remind ourselves, remind our students, that that’s our foundation.” (Er. Ex. 49, at 1.) Dr. Marcheschi also prayed, “Granted those *who teach* and those who learn may find you [Eternal God] to be the source of all truth. . . . Equip us to *teach with truth*, for we help to shape the conscience.” (*Id.* (emphasis added).) Dr. Marcheschi then delivered a 20-minute presentation about the Catholic identity and Mercy charism of the University “in recognition of the importance of the role played by our adjunct faculty.” (Tr. 611; Er. Ex. 49.) Among other things, Dr. Marcheschi emphasized the following with adjunct faculty:

- The University’s mission statement “says that *we are faculty* versed and fond about the Sisters of Mercy . . . who search for truth.” (Er. Ex. 49, at 3 (emphasis added).)
- The University “reflects and extends the teaching mission of Jesus.” (*Id.*)

- “[I]n the Christian context . . . [w]e strive to set our students free from ignorance, from self-centeredness, not just for themselves, but for the common good.” (*Id.*)
- Saint Xavier strives to “find energy and focus and direction in the story and the life of Jesus.” (*Id.* at 4.)
- “All learning is essentially religious” because “we operate out of a conviction that we live within a God-made world” and “the more you learn about the world, the more you learn about the creation, the more you learn about the Creator. . . . [A]ll of learning discloses to us the Creator of the universe. And we describe God as being all that is good, all that is true, and all that is beautiful.” This conviction applies to science, literature, art and all other disciplines. (*Id.* at 4–5.)

The purpose of this presentation is to ensure that Saint Xavier’s adjunct faculty members understand that Saint Xavier is “a Catholic Christian institution, and we were founded to be the face of Christ in the world, and to carry out our ministry of education with a faith perspective so that when we help students to grow, we want them to grow in every aspect of their life, physically, emotionally, intellectually, but also spiritually.” (Tr. 612.) The goal is for faculty to bring to their classrooms an awareness of the fact that Saint Xavier exists to extend the teaching mission of Jesus Christ so that their students can take away from their Saint Xavier experience “a commitment to this larger dimension of life that we call faith.” (Tr. 622–23.)⁵ Saint Xavier believes that faith “pervades all of life” and therefore “expect[s] [faith] to pervade all of [its] classes, whether they’re liberal arts or whether they’re sciences.” (Tr. 623.) In other words, Saint Xavier “would expect a well-informed faculty member, which is the only kind [it] would want, to be able to” express that there is no dichotomy between faith and reason. (Tr. 661; *see*

⁵ One of Petitioner’s own exhibits demonstrates a wonderful and public example of Saint Xavier’s faculty bringing the teaching mission of Jesus Christ into their classrooms. In an article recognizing the success of Saint Xavier’s online graduate nursing program, Dean Gloria Jacobson is quoted as saying: “This ranking illustrates a commitment to excellence in nursing education and demonstrates the dynamic leadership and talented faculty who incorporate best practices in online education at St. Xavier University. We encourage all SXU grad nursing students to acquire the knowledge and skills needed to make a changing and challenging healthcare environment with compassion, service, hospitality and integrity throughout their educational journey and beyond, we *expect them to always hold true to the core values grounded in our Mercy heritage* that highlights the importance of respect, excellence, and learning for life.” (Pet. Ex. 41 (emphasis added).)

also Tr. 891–92 (Provost Paul DeVito stating his expectation that faculty be willing and able to have an intellectual discussion about the nexus of faith and reason).)⁶

Saint Xavier reinforces the role of adjunct faculty members in furthering and maintaining Saint Xavier’s religious educational mission throughout their employment. Saint Xavier’s Office of University Mission and Ministry (“UMM”), headed by Dr. Marcheschi, takes the lead in that regard. UMM is primarily charged with ensuring that Saint Xavier lives out its Catholic identity—specifically, that its Catholic identity is visible, palpable, and experienced. (Tr. 554.) It is also charged with ensuring “that everyone who comes into the University understands that when they take a position with [the University] they’ve agreed to partner with the University in the living out of that [Catholic] identity.” (*Id.*) To carry out its charge, UMM offers programming designed to educate and involve the Saint Xavier community—and specifically its faculty—in the University’s religious identity and mission. (*Id.* at 554–55, 595.) These programs include but are not limited to: (i) Catholic alternative spring break trips (Tr. 561–63), (ii) the Catholic Colloquium Lecture Series (Tr. 571, 764–65), (iii) the Squeaky Weal Lecture Series (*id.*), (iv) the Pub Discourse program (Tr. 576), (v) the God Matters radio program (Tr. 578–79), (vi) Stations of the Cross (Tr. 582), (vii) Mentoring for Mission (Tr. 588), (viii) the Mercy Book Club (Tr. 593–94), and (ix) the annual Interfaith Expo (Tr. 628–29, 765–66). Significantly, the purpose of all of these programs with respect to faculty is to allow faculty members to “use their own mind and their own creativity” to put Saint Xavier’s religious educational mission into practice in the classroom so as to help students understand “that faith and reason belong in the same room.” (Tr. 596, 619.)

⁶ Petitioner’s witness, history and political science professor Peter Kirstein, corroborated this understanding in his testimony that he was told to incorporate “the bishops or papal documents” into his coursework where potentially applicable and to “read the mission statement” to his class. (Tr. 467–68, 469.)

Saint Xavier does not require its faculty members to attend or participate in any of Saint Xavier's religious programs or activities. (Tr. 658–59, 711–12, 769.) This approach is intentional: It would be antithetical to Saint Xavier's religious educational environment to coerce participation.⁷ (Tr. 622–23; 658–59, 711–12.) As a higher education institution, Saint Xavier pursues its religious educational mission through an enthusiastic, voluntary atmosphere—it has made the conscious decision that its religious educational mission requires an invitational, not coercive approach, so that members of its community feel a sense of freedom about the extent of their involvement in the religious life of the University. (Tr. 658–59.) Saint Xavier's invitational approach is “the Catholic way” and ensures that “if and when people do come” to religious events, “they come because their hearts are there and they want to really be supportive.” (Tr. 711–12.) “The ethos of Saint Xavier is such that the opportunities provided to understand, appreciate, deepen, engage in the religious mission of the university are consistent, regular, almost pervasive, and the atmosphere is such that the invitational sense is far more consistent with the way Saint Xavier understands its religious identity than any form of mandatory participation.” (Tr. 769.) This invitational approach is “consistent with how [Saint Xavier] understand[s] [and] express[es] [its] Catholicity, [its] religious mission, and [its] engagement in building the community.” (*Id.*) If Saint Xavier required or coerced people to attend religious programming, it would face “resistance and dislike” and would not have “the kind of community building atmosphere” it seeks to create. (Tr. 769–70.)

⁷ Petitioner incessantly asked Saint Xavier's witnesses on cross-examination to confirm that participation was not required in its religious events. (*E.g.*, Tr. 659, 663–666, 670, 686–89, 705–06, 710, 814–15, 817, 1022–23, 1025, 1061–62.) This line of questioning demonstrates a fundamental misunderstanding of and disregard for what those witnesses had already testified, namely that requiring participation in religious programming would detract from Saint Xavier's mission rather than enhance it. Unfortunately, as set forth more fully below, the Region appears to have accepted Petitioner's baseless argument (Order at 12), paying no regard whatsoever—and in fact avoiding entirely—Saint Xavier's clearly-articulated religious reasons for *not* coercing participation in its religious programming.

While not coercive, Saint Xavier's invitational approach is extremely active: It involves broad advertising campaigns using e-mail, fliers, and newspaper ads. (Tr. 766.) It also involves consistently reaching out to department chairpersons, deans, and the Office of the Provost requesting faculty attendance and participation. (Tr. 603, 763.) It also involves personal invitations to specific faculty members who have participated in religious programs in the past or may have an interest in particular programs because of their discipline. (Tr. 766.) In addition, UMM is regularly in contact with University President Christine Wiseman regarding ways to increase faculty participation in religious programming, which President Wiseman consistently supports. (Tr. 603.) Saint Xavier also encourages faculty attendance at Spirit of Mercy Day—a major University-wide liturgy—by cancelling classes on that day. (Tr. 602–04; 768.) Even the Union's own witness, James Kollros, admitted that he had been “very, very strongly encouraged” to attend some of Saint Xavier's religious events and that he had attended various activities where Saint Xavier's religious mission was discussed. (Tr. 515, 1056–57, 1061.)

Saint Xavier also provides incentives for faculty members to participate in religious programming. For example, during the past two years, UMM asked students to nominate faculty members to participate in the University's liturgical celebrations—specifically, faculty members who “embody the mission” and “fit in well as representatives of the mission.” (Tr. 600.) Students identified several, whom UMM then invited to participate in liturgy. (*Id.*) All of the faculty members whom UMM invited to participate accepted that invitation. (*Id.*) Saint Xavier also is exploring a program to support faculty (including adjunct faculty), via a stipend, to prepare papers on a variety of social issues in an ongoing effort to contribute to the Catholic intellectual tradition. (Tr. 574–75.) Adjunct faculty members who actively engage in Saint

Xavier's religious educational mission may also be more likely to receive promotions than those who do not. (Tr. 770.) The Region ignored these facts in its June 1 Order.

As a result of Saint Xavier's efforts, Saint Xavier adjunct faculty members have a robust history of creating and maintaining Saint Xavier's religious educational environment both in and out of the classroom. By way of example, Saint Xavier's witnesses testified to the following ways that specific adjunct faculty members have created and maintained the University's religious educational environment both in and out of the classroom:

- In the mere three years that Dr. Marcheschi has been employed by Saint Xavier (Tr. 551), adjunct faculty members Cynthia Kamp, Denise DuVernay, James Steyskal, and Dannis Matteson all participated in Saint Xavier's Catholic spring break programs to serve the disadvantaged in accordance with the hallmark of Saint Xavier's Mercy heritage: Service. (Tr. 561, 564–55.) These faculty members both accompanied students on these programs and actively participated; the programs themselves took place at Catholic institutions and included prayer, liturgy, and spiritual reflection. (Tr. 562–64.)
- David Neff,⁸ a faculty member in the Religious Studies Department, has been active for years in the Interfaith Expo, an annual event where Saint Xavier examines a topic from the faith perspective of various world religions. (Tr. 629.) Dr. Neff has moderated the event and invited his class to participate by asking them to provide feedback on chosen topics and generate questions for a dialogue between presenters and audience. (*Id.*) Significantly, faculty members originated the Interfaith Expo “in order to widen the forum for interreligious dialogue and the opportunity for students to experience, in both informal and formal ways, association with various religious traditions.” (Tr. 765–66.)
- Adjunct faculty members David Neff, Cynthia Kamp, and Daniel Olsen⁹ attend and participate in Saint Xavier's Catholic Colloquium series—a lecture series that brings to campus prominent and well-recognized Catholic theologians and intellectuals—including by bringing their classes. (Tr. 762–63, 764–65.)

⁸ Dr. Neff was on the original Excelsior List and was employed as an adjunct faculty member at Saint Xavier at the time of the hearing. (*See* Er. Ex. 61.)

⁹ Dr. Olsen and Dr. Kamp were on the original Excelsior List and were both employed as adjunct faculty members at Saint Xavier at the time of the hearing. (*See* Er. Ex. 61.)

- Adjunct faculty members participate in Saint Xavier's Squeaky Weal Lecture Series, a program designed to explore issues of social justice in the context of the Catholic tradition. (Tr. 571, 573, 579–81.) They attend, bring students, encourage students to attend, offer their students extra credit for attending, and deliver prepared responses to presentations to facilitate dialogue. (Tr. 571.)
- Faculty members are heavily involved in Saint Xavier's Pub Discourse program—an opportunity to identify, hear presentations on and informally discuss important Catholic topics—by choosing the speakers and topics. (Tr. 567–77.) For example, the last Pub Discourse held at Saint Xavier was on the afterlife and presented by Tammy Bobel,¹⁰ an adjunct faculty member in the Psychology Department. (Tr. 577–78.)
- Faculty members have been guests on Saint Xavier's God Matters radio program, initiated by the Sisters of Mercy to discuss religious topics and issues. (Tr. 578–79.)
- Adjunct faculty members, including David Neff, have attended and brought their classes to attend Stations of the Cross, a Catholic prayer forum offered by Saint Xavier during the Lenten season. (Tr. 582–83.)
- At least one adjunct faculty member participates in Saint Xavier's Mentoring for Mission program, which involves monthly meetings to discuss Saint Xavier, what it means to be a Catholic and Mercy university, and most importantly how to apply Saint Xavier's Catholic and Mercy identity in the classroom. (Tr. 588–89.)
- Adjunct faculty member James Rabbitt¹¹ helped design the Bishop John Gorman Institute for Catholic Educational Leadership, an institute sponsored by Saint Xavier to collaborate with the Archdiocese of Chicago to provide ongoing educational formation for Catholic elementary and high school personnel. (Tr. 771–72.)
- Adjunct faculty member Ann Czarny applied to the Pastoral Ministry Institute's graduate program in pastoral studies because of her interest in spiritual and pastoral preparation for parish ministry as well as to enhance her healing ministry as a nurse and nursing instructor. (Tr. 775–777; Er. Ex. 55.)
- Laura Shallow, a former adjunct instructor in the Graham School of Management (now on the President's Advisory Board),¹² advances Saint Xavier's religious educational mission by bringing “religious perspectives” into her courses, such as the

¹⁰ Ms. Bobel was on the original Excelsior List and was employed as an adjunct faculty member at Saint Xavier at the time of the hearing. (See Er. Ex. 61.)

¹¹ Dr. Rabbitt was on the original Excelsior List, but was not employed as an adjunct faculty member at Saint Xavier at the time of the hearing. (See Er. Ex. 61.)

¹² Dr. Shallow appeared on the original Excelsior List. (See Er. Ex. 61.)

importance of conscious formation and the role that her faith provides in helping to shape her corporate life. (Tr. 778–79.) Significantly, Dr. Shallow, who is a Mercy Associate (a layperson formally affiliated with the Sisters of Mercy), contacted Dr. Avis Clendenen—Special Assistant to the President and Professor *Emeritus* of Religious Studies (Tr. 729–30)—to identify more ways to become engaged in service opportunities as an adjunct faculty member at the University. (Tr. 779–80.)

- Adjunct faculty member Daniel Olsen teaches graduate students in the Pastoral Ministry Institute who are considering or preparing for an active ministerial life in the Church. (Tr. 781–83; Er. Ex. 54.)
- Adjunct history professor, Alex Kurczaba, contacted Dr. Marcheschi to discuss a film series called the Decalogue, comprised of ten one-hour films, each of which is based on the Ten Commandments. (Tr. 626–27.) Demonstrating a clear understanding of and desire to support the religious educational mission of Saint Xavier, Dr. Kurczaba went out of his way to include these religious films as part of his course and share that initiative with Dr. Marcheschi, the Vice President of Mission and Ministry. (*Id.*; Er. Ex. 51.)

Far from exhaustive, and not isolated in significance, this list describes only the specific religious activities of adjunct faculty members that Saint Xavier’s witnesses recalled at the hearing. It would be impossible for these witnesses, or any other individuals, to know the myriad other ways in which Saint Xavier’s adjunct faculty members help to sustain the University’s religious educational environment. (*E.g.*, Tr. 565, 569, 765, 784, 852.)

ARGUMENT

I. THE *PACIFIC LUTHERAN UNIVERSITY* TEST IS CONSTITUTIONALLY INFIRM AND SHOULD BE DISCARDED IN FAVOR OF THE *GREAT FALLS* TEST, WHICH SAINT XAVIER EASILY MEETS

A. The *PLU* Test Is Unconstitutional And Should Be Discarded

The *PLU* test has two prongs. The first—whether a school holds itself out as providing a religious educational environment—is consistent with the U.S. Constitution, *Catholic Bishop*, and *Great Falls*. This Prong requires only that an institution show its bona fides as a religious educational institution through a limited set of objective facts. The problem with the *PLU* Test

lies in Prong 2, which asks whether a school holds out the petitioned-for faculty unit as performing a specific religious function. The Board claims it chose Prong 2 over the *Great Falls* Test because *Great Falls* “goes too far in subordinating” labor rights. *PLU*, at *8. But subordinating the U.S. Constitution, as the Board has done, turns the law on its head.

The problems with Prong 2 are myriad. First, it represents a marked and improper divergence from *Catholic Bishop*. *Catholic Bishop* held that the Board’s ongoing oversight over teachers at religious schools presents an impermissible risk of entanglement, and therefore that religious school faculty members—who have an inherent “critical and unique role” in fulfilling a school’s religious mission—are *per se* outside Board jurisdiction. 440 U.S. at 501. Invoking the doctrine of constitutional avoidance, the *Catholic Bishop* Court ordered the Board to decline jurisdiction over religious schools because doing so would raise “serious First Amendment questions.” 440 U.S. at 504; *see also Great Falls*, 278 F.3d at 1340. By contrast, the Board in *PLU* improperly seeks to balance the First Amendment with the National Labor Relations Act to assert “the broadest jurisdiction constitutionally permissible.” *PLU*, at *8. The Board acknowledges that asserting jurisdiction over a school like Saint Xavier raises First Amendment questions as soon as it meets Prong 1. *Id.* at 9. Prong 2 thus extends the jurisdictional inquiry beyond necessary and permissible bounds.

Second, while the Board claims to have discarded its “substantial religious character” test, Prong 2 merely repackages that test. Like Prong 2, the substantial religious character test required an evaluation of “the role of the unit employees in effectuating [the] purpose” of a religious university’s operations. *Univ. of Great Falls*, 331 NLRB No. 188, *4 (Aug. 31, 2000). The Board attempts to separate from the substantial religious character test by focusing on the faculty rather than the institution, but the Board’s shift from asking whether an institution is

sufficiently religious to whether the functions of its faculty are sufficiently religious suffers from the same constitutional defect. The Board’s (and Region’s) suggestion that a “specific religious function” requires some sort of proselytization or indoctrination illustrates the problem. *PLU*, at *12.¹³ Not only is it constitutionally improper for the Board to weigh in on what is or is not a religious function, but in attempting to determine whether Saint Xavier’s faculty have such a function, the Board simply misunderstands Catholic theology. Saint Xavier, in the Catholic Intellectual Tradition, consciously avoids proselytization and indoctrination in fulfilling its religious educational mission. (Tr. 612, 658–59, 986.) This approach is purposeful and necessary in Saint Xavier’s “search for truth.” (*See supra*, at 4–5.) Catholic higher education is not draconian, as the Board and Region would require to decline jurisdiction. The June 1 Order shows that the Region was looking exclusively for propagation, rigid requirements, or strict discipline of or by university faculty (Order at 1.), but Catholic higher education does not require these strictures.¹⁴ Rather, Catholic higher education asks faculty to connect faith and reason in their teaching, to be aware of and further the mission of the Church, and not to denigrate the tenets of Catholicism in their teaching. The Region belittles these sentiments, and its crabbed view of “religious functions” in the wake of *PLU* shows how the *PLU* Test revives the discarded and constitutionally infirm substantial religious character test by merely applying it to Saint Xavier’s faculty rather than the institution as a whole. *See also Great Falls* at 1340, 1346 (a focus on whether faculty members are “required to be Catholics, to teach Church doctrine, or to

¹³ The Board claims that it will not require a showing that faculty members are required to proselytize or to indoctrinate students, *PLU*, at *12 n.14, but the practical effect of its test, as the June 1 Order clearly illustrates, is that the Board requires exactly that.

¹⁴ The Region went so far as to suggest that Saint Xavier should “monitor[] adjuncts to know if they receive any messages regarding the University’s Catholic mission.” *Id.* The idea that Saint Xavier must monitor its faculty to prove its Catholicity is a proposition that has no place in a jurisdictional analysis. The inclusion of this factor in the Region’s decision shows that the *PLU* Test is really trying to probe into the minutia of the relationship between Saint Xavier and its faculty.

support the Church or its teachings” evinces “an unnecessarily stunted view” of *Catholic Bishop*).

Third, the Board improperly purports to decide in *PLU* when faculty members at a religious school are “indistinguishable from secular teachers,” even though making this determination violates the Supreme Court’s admonition against government inquiry into the difference between the “religious” and the “secular.” *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (“The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.”) (footnote omitted); *see also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014) (observing that analysis of whether legislative prayers were nonsectarian “would involve government in religious matters to a far greater degree”); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (concluding that inquiry into “whether a school is pervasively sectarian is not only unnecessary but also offensive”); *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 694 (1989) (rejecting proposal that “would force the IRS and the judiciary into differentiating ‘religious’ services from ‘secular’ ones”).¹⁵ Exemplifying the entanglement inherent in such a determination is the Board’s preemptive finding in *PLU* that a teacher’s role in furthering components of mission such as diversity and academic freedom are secular in nature. *PLU*, at

¹⁵ The June 1 Order in this case illustrates why the Supreme Court rejects such an inquiry, as the Order shockingly declares that the mandatum—which is “an acknowledgment by Church authority that a Catholic professor of a theological discipline is a teacher within the full communion of the Catholic Church” and a recognition of a “professor’s commitment and responsibility to teach authentic Catholic doctrine and to refrain from putting forth as Catholic teaching anything contrary to the Church’s magisterium” (Er. Ex. 49 at Art. 4.4.e)—is no different from a requirement that mathematics be taught accurately. Order at 13. This ill-advised comparison is but one illustration of the problems that arise when a government agency judges religious principles and proves why the Board’s approach in *PLU* is so wrong.

*11–12. This finding is also factually incorrect: Diversity and academic freedom are not only compatible with religious mission, but *essential* to it—Saint Xavier could not fulfill its mission as a Catholic institution or meet its obligations under *Ex Corde* without adhering to these principles. (Tr. 992–93, 1024; Er. Ex. 33; *see also* Er. Ex. 62, at 7–8.)

The Board also appears not to have considered the inconsistencies and practical difficulties of the *PLU* Test. For example, the Board recognizes that evidence about “specific employees in the petitioned-for unit” would be relevant, presumably to ensure that it does not assert jurisdiction over individual faculty members who perform a religious function. *PLU*, at *10, *12 & n.13. However, the Board simultaneously recognizes the constitutional entanglement presented by an “examination of the actual functions performed by employees.” *PLU*, at *11. The Board also fails to account for the burden imposed on an institution, its faculty, and the Board to investigate the religious function of individual faculty members to ensure that the Board does not improperly assert jurisdiction. The Board also fails to consider the regulatory nightmare it would face if it were called upon to resolve unfair labor practice charges based on religiously-motivated conduct by a university or to preside over collective bargaining where the Union makes demands that conflict with an institution’s religious beliefs. *See Bayamon*, 793 F.2d at 401–02 (then Judge Breyer describing the U.S. Supreme Court’s concerns in *Catholic Bishop* with Labor Board entanglement in a religious university’s affairs).

The *PLU* test also creates a fatal line-drawing problem: Once evidence is in the record regarding the specific religious functions of individual faculty members, the Board will have to determine which of those faculty members have a function that is “religious enough” to bring them outside of Board jurisdiction and which do not. At Saint Xavier, for example, adjunct faculty members such as Daniel Olsen prepare students for ministry—a religious function by any

standard. (Tr. 781–83.) But Saint Xavier elicited testimony about numerous other examples of adjunct faculty participation in and furtherance of the religious mission of the University as well. For example, David Neff and Cynthia Kamp teach in the Department of Religious Studies and are active participants in Saint Xavier’s many religious offerings. (Tr. 564–55, 764–66; Er. Ex. 60.) Similarly, Ann Czarny is an adjunct faculty member who sought a degree from Saint Xavier’s Pastoral Ministry Institute specifically to enhance her healing ministry as a nurse and nursing instructor. (Tr. 775–777; Er. Ex. 55.) And Alex Kurczaba, an adjunct history professor not formally affiliated with any specifically religious department, nonetheless brought religion into his classroom in the form of a ten-part film about the Decalogue. (Tr. 626–27; Er. Ex. 51.)¹⁶

As these examples illustrate, adjunct faculty have been and will continue to be inspired to further Saint Xavier’s religious educational mission.¹⁷ It is unclear where the Board will draw the line in terms of asserting jurisdiction over particular individuals or on what basis that line will be drawn, and, as Member Johnson points out at footnote 13 of his dissenting opinion in *PLU*, asserting jurisdiction over some faculty members but not others risks discrimination based on religious preference. *See also Bayamon*, 793 F.2d at 402–03 (then-Judge Breyer warning against ad hoc efforts to avoid entanglement, including excluding only certain subsets of employees from Board jurisdiction). The Region, faced with these complex religious

¹⁶ It must be noted that while these examples may demonstrate varying degrees of religious participation, Saint Xavier does not consider them to be different in kind.

¹⁷ An additional problem with *PLU* is that it wrongly assumes that a religious institution’s religious mission is frozen in time. The Board is interested only in a university’s “contemporary presentation” of itself, but the record shows that Saint Xavier’s religious educational mission is dynamic and that Saint Xavier has been working since at least the promulgation of *Ex Corde* in 1990 to determine how best to hire for mission. (*E.g.*, Tr. 1005–06.) *PLU* also does not and cannot address how the Board would handle reassessing jurisdiction in the event that Saint Xavier revised its religious requirements in the future. There is no doubt that calling upon the Board or Courts to oversee indefinitely Saint Xavier’s religious matters “involve[s] significant entanglement” and is “precisely what the Supreme Court in *Catholic Bishop* sought to avoid.” *Bayamon*, 793 F.2d at 402–03.

entanglement issues, completely neglected the substantial evidence in the record of specific religious functions performed Saint Xavier's adjunct faculty.¹⁸

B. Saint Xavier Meets The *Great Falls* Test

In light of the foregoing, the Board should discard its unconstitutional *PLU* Test in favor of the *Great Falls* Test—the only standard approved by a body with competence to opine on constitutional matters. Under *Great Falls* the Board cannot assert jurisdiction over a university that (1) holds itself out as providing a religious educational environment, (2) is organized as a nonprofit, and (3) is affiliated with a recognized religious organization. Prong 1 of the *Great Falls* Test is essentially the same as Prong 1 of the *PLU* Test, and the Region has already correctly held that Saint Xavier meets that Prong by holding itself out as providing a religious educational environment. Order at 11. Prongs 2 and 3 are also easily met: It is not disputed that Saint Xavier is a 501(c)(3) nonprofit organization (Tr. 25; Er. Ex. 7) or that it is affiliated with the Catholic Order of the Sisters of Mercy (*E.g.*, Er. Ex. 14; 2011 RFR, at 2–6). Thus, the Board should decline jurisdiction over Saint Xavier under *Great Falls*.

II. THE REGION ERRED IN ASSERTING JURISDICTION OVER THE PETITIONED-FOR UNIT UNDER *PACIFIC LUTHERAN UNIVERSITY*

The Region correctly found that Saint Xavier meets Prong 1 of the *PLU* Test by holding itself out as providing a religious educational environment. Order at 11. However, the Region incorrectly found that Saint Xavier does not meet Prong 2, which asks whether Saint Xavier holds out the petitioned-for faculty unit as performing a religious function. Among other things,

¹⁸ Although the Board need not reach this issue, the *PLU* Test, depending on its application, could also substantially burden Saint Xavier's free exercise rights in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2000). The *PLU* test allows for a jurisdictional analysis based in part on how individual faculty members further religious mission in practice. This analysis risks forcing Saint Xavier's faculty members to choose between furthering Saint Xavier's religious mission on the one hand and joining a Board-approved bargaining unit on the other. This dilemma would impede Saint Xavier's pursuit of its religious educational mission by discouraging faculty who may want to be represented by a Board-approved bargaining unit from taking an active role in creating and maintaining Saint Xavier's religious educational mission.

the Board will consider for Prong 2 whether such faculty members “are hired, fired, and assessed under criteria that . . . implicate religious considerations.” *PLU*, at *11. The Board will also consider whether “the religious nature of the university will have any impact at all on” the petitioned-for faculty’s employment and whether faculty roles are different than those that “they would be expected to fill at virtually all universities.” *Id.* at *12. Relevant evidence includes but is not limited to job descriptions, employment contracts, and faculty handbooks. *Id.* Significantly, the Board states that it will “rely on the institution’s own statements about whether its teachers are obligated to perform a religious function, without questioning the institution’s good faith or otherwise second-guessing those statements” and “focus[] on whether a reasonable prospective applicant would conclude that performance of [his/her] faculty responsibilities would require furtherance of the college or university’s religious mission.” *Id.* Saint Xavier’s adjunct faculty meets this standard.

Saint Xavier’s practices, documents, and public statements amply hold out its adjunct faculty as having a role in maintaining Saint Xavier’s religious educational environment. For example, adjunct faculty candidates are informed of their religious function pre-hire in both job descriptions and interviews. (*See supra*, at 9–10.) Indeed, Saint Xavier’s two publicly posted job descriptions for available adjunct faculty positions at the time of the hearing each *require* an “[u]nderstanding of and appreciation for the Catholic identity and Mercy heritage of the University.” (Er. Exs. 58 & 59; Tr. 883–86.) The Region held that this is an insufficient “generalized statement[]” (Order at 11); but it is not—it is a clearly articulated job requirement. For the Board to state otherwise would be to substitute its judgment for Saint Xavier’s regarding what a proper religious-based job requirement should be.

The record also shows that in interviews, adjunct faculty candidates are expected to demonstrate both how Saint Xavier's mission and identity would affect their teaching and scholarship and how they would advance that mission and identity. (Tr. 751–52, 870–73, 886–88, 1007.) If adjunct faculty candidates cannot describe their relationship to the University's mission, they are unlikely to be hired. (Tr. 872, 888, 1008–09.) The Region appears to have discredited this testimony in part because Saint Xavier did not present any deans or department chairs as witnesses on this topic, and therefore did not present direct evidence of these expectations. Order at 7. This conclusion is simply wrong. Saint Xavier presented direct evidence of its expectations of adjunct faculty in the form of its job descriptions, faculty manual, and orientation materials. Further, Dr. Avis Clendenen, currently Special Assistant to the President, testified about how she actually conducted adjunct faculty interviews during her time as Chair of the Department of Religious Studies. (Tr. 750–57.)¹⁹

Adjunct faculty members are also informed of their religious function at the commencement of their appointments through the Faculty Resources Manual, which contains descriptions of their religious functions (Er. Ex. 53; *see also supra*), as well as through the portion of the adjunct faculty orientation program led by Dr. Marcheschi (Tr. 872, 888, 1008–09; *see also supra*). Saint Xavier further reinforces the religious functions of adjunct faculty throughout their employment. The University continuously informs them about religious programming and encourages them both to attend and to apply learned lessons in their coursework. (*See supra*.) Public speeches delivered at University events further describe the religious function of Saint Xavier's faculty to students, the community at large, and faculty

¹⁹ Provost Paul DeVito testified that he does not sit in on every interview of an adjunct faculty candidate, nor does he have the capacity to do so. However, he directs his deans and department chairs to do so and has no reason to believe they would not or do not follow his directive. (Tr. 977.)

themselves. (Er. Exs. 62, 63.) Finally, as Petitioner’s own witness testified, adjunct faculty members who denigrate Catholicism or Saint Xavier’s religious educational mission are subject to discipline. (Tr. 755–56, 1010, 1011–12, 1015–16, 1024, 1059–60.) The religious nature of Saint Xavier thus has a direct impact on the employment of its adjunct faculty members, who are indisputably subject to employment-related decisions based on religious considerations. *See PLU*, at *11, *13 n.19.

Despite the myriad evidence about the religious functions of adjunct faculty members, the Region found that Saint Xavier does not meet Prong 2 of the *PLU* Test. The Region’s analysis misses the mark. For example, on the topic of Saint Xavier’s hiring practices, the Region appears to have credited the testimony of two adjuncts in 2011 and one adjunct in 2015 who, according to the Region, “testified that they were neither made aware of the mission identify [of Saint Xavier] nor asked to support the Catholic faith in their teaching.” Order at 7. Crediting this testimony is problematic for several reasons. First, none of the adjuncts who testified for the Union were hired during the tenure of Saint Xavier’s current Provost, Dr. Paul DeVito. Thus, they cannot refute Dr. DeVito’s testimony, which, as the Region noted, is that adjunct candidates are “made aware of the mission and identity [of Saint Xavier] and [must be] able to support that in their teaching primarily.” *Id.* (*See also* Tr. 872–73 (testimony of Provost DeVito); Tr. 1007 (testimony of President Wiseman that she speaks to Provost DeVito “often” about how to hire faculty for mission.) Second, the Region has apparently disregarded (or failed to mention) the 2011 and 2015 testimony of another adjunct faculty member, James Kollros, who corroborated Saint Xavier’s position on cross-examination by acknowledging there would be consequences if he denigrated Saint Xavier’s religious educational mission and admitting that he had been “very, very strongly encouraged” to attend Saint Xavier’s religious events. (Tr. 515,

1056–57, 1059–61.) Third, the 2015 witness who the Region credits appears to be Marie Cassidy, but crediting Ms. Cassidy is clear error: (1) Ms. Cassidy’s direct examination on the topic of her job requirements was nothing more than a series of leading questions that resulted in one word “No” answers—it has and should be given no weight;²⁰ (2) Ms. Cassidy affirmatively demonstrated her lack of credibility when she testified she had never seen the Faculty Resources Manual despite having received a copy prior to every semester in which she taught (*see supra* at n.4); (3) Ms. Cassidy testified that she does not have time to read her Saint Xavier emails, and therefore has no idea what Saint Xavier may have told her over the years (*id.*); and (4) the Region’s characterization of Ms. Cassidy’s testimony as having not been “made aware of the mission identity” contradicts her actual testimony, which is that she is aware that Saint Xavier is a Catholic institution, aware of its mission and philosophy, aware that it has crucifixes in its classrooms, and aware that classes are cancelled for Christian holidays (*id.*).

The Region also relied heavily on the fact that the programming offered by Saint Xavier’s Office of Mission and Ministry—including an orientation program specifically for adjunct faculty—is not mandatory. Order at 7, 12. However, the Region’s insistence on religious compulsion to decline jurisdiction misconstrues *Catholic Bishop*. *See Great Falls* at

²⁰ See Tr. 833–34:

“Q. When you were hired, did anyone ever tell you that you were going to be required in any way to adhere to the Saint Xavier mission, a Mission Statement?

A. No.

Q. Have you to the current date ever been advised that you are required as a condition of employment to adhere to the Mission Statement of Saint Xavier University?

A. No.

Q. When you receive a contract from Saint Xavier University, is there anything in it that states that you’re required to adhere to Catholicism or their Catholic mission or their Mission Statement?

A. No.

Q. There’s a statement about the uniqueness of a Catholic university and that’s communicated in the classes. Has that ever been articulated to you as an expectation?

....

A. No, I haven’t heard that.”

1340, 1346 (a focus on whether faculty members are “required to be Catholics, to teach Church doctrine, or to support the Church or its teachings” evinces “an unnecessarily stunted view” of *Catholic Bishop*). It also disregards the record, as the Region did not address—because it cannot address without entangling itself in Saint Xavier’s religious affairs—evidence that Saint Xavier’s decision not to coerce or compel participation in religious activities is itself religiously motivated and intended to pursue its religious educational mission through an enthusiastic, voluntary atmosphere. (See Tr. 622–23; 658–59, 711–12.) In short, neither the Board nor the Region may constitutionally tell Saint Xavier that its decision not to coerce participation in religious programming makes it insufficiently religious for the Board’s jurisdictional purposes.

Finally, the Region appears to have limited acceptable “religious functions” under *PLU* to (i) integrating religious tenets into coursework, (ii) serving as religious advisors to students, (iii) propagating religious tenets, and (iv) engaging in religious indoctrination or training. *E.g.*, Order at 12. Although Saint Xavier believes the *PLU* test cannot be salvaged from a constitutional perspective, *PLU* cannot and should not be read as limiting “religious functions” exclusively to these examples; rather, the Board intended these examples to be non-exhaustive. The Region erred by failing to consider whether the activities that Saint Xavier’s adjunct faculty are expected to undertake and actually do undertake are “religious functions” under *PLU*. In this regard, the Board need not look any further than Dr. Marcheschi’s public statements at the most recent adjunct faculty orientation that adjunct faculty are expected to (i) be “versed and fond about the Sisters of Mercy . . . who search for truth,” (ii) “reflect[] and extend[] the teaching mission of Jesus,” (iii) “in the Christian context, . . . strive to set our students free from ignorance [and] from self-centeredness,” or (iv) understand that “[a]ll learning is essentially religious.”

(Er. Ex. 49, at 3–5.) In sum, Saint Xavier satisfies the *PLU* Test, and the Board should not assert jurisdiction over it.²¹

III. IN THE ALTERNATIVE, THE REGION ERRED IN FAILING TO ORDER A NEW ELECTION

In its post-hearing brief, Saint Xavier argued that if the Region should determine that Saint Xavier does not hold out *all* members of the petitioned-for unit as performing a religious function, it must at least find that (a) a significant portion²² of the unit indisputably performs a religious function, (b) the Board has no jurisdiction over at least these individuals, and (c) a new election is warranted because Saint Xavier lacked reason and opportunity to segregate and challenge individual votes in 2011 on the basis of the voters’ particular religious functions. Saint Xavier argued that adjunct faculty members whose ballots would need to be challenged and segregated are those who (a) teach or taught in the Department of Religious Studies or the Pastoral Ministry Institute, and/or (b) participate or participated in religious programming or otherwise bring or brought Catholic theology into their classrooms. The Region held that adjuncts who teach in the Pastoral Ministry Institute are exempt from Board jurisdiction, but that those who teach in the Department of Religious Studies are not. Order at 13. This distinction was in error. The Region also failed to address the many specific instances in the record of individual adjunct faculty members indisputably performing religious functions at Saint Xavier

²¹ Before the Board is another representation case involving Saint Xavier’s housekeeping employees. See *Saint Xavier Univ.*, 13-RC-092296. Because the instant case concerns the “critical and unique role” of faculty at Saint Xavier, the Board need not reach in this case the question whether the rationale of *Catholic Bishop* extends to the University as a whole.

²² Saint Xavier’s unwavering position is that all of its adjunct faculty members perform a religious function. Although the religious roles of faculty members described in this section may be more understandable or tangible to the Board, Saint Xavier does not perceive them as being different in kind from the role of any other faculty member in furtherance of Saint Xavier’s religious educational mission. Indeed, these adjunct faculty members exemplify how adjunct faculty effectuate the religious mission of Saint Xavier in numerous ways and thus support the argument that the Board does not have jurisdiction over the entire proposed unit.

and also failed to address Saint Xavier's request for a new election. These omissions, too, were in error.

Contrary to the Region's analysis, all adjunct faculty members in Saint Xavier's Department of Religious Studies are outside the scope of the Board's jurisdiction. As Dr. Clendenen, former Chair of the Department of Religious Studies explains, that Department "understands itself to carry the religious mission [and] the educational mission in a special way by providing substantial courses in the founding tradition, being Roman Catholicism, as well as in the development of pastoral ministry, formal training for students interested in service in the Church." (Tr. 748.) For this reason, faculty members in the Department of Religious Studies are presented with *Ex Corde* and are even required to understand that *Ex Corde* is a part of Saint Xavier's self-understanding. (Tr. 815–16.) Accordingly, all adjunct faculty members who teach in the Department of Religious Studies perform a religious function at Saint Xavier, and the Board must not assert jurisdiction over them.

Second, although the Region failed to address this argument, the Board should also decline jurisdiction over any specific adjunct faculty member who Saint Xavier can show performs a religious function in fact. This group includes, at a minimum, the following:

- Cynthia Kamp, who appears on the original Excelsior List and who has participated in Saint Xavier's Catholic spring break programs and who attends and participates in Saint Xavier's Catholic Colloquium series;
- Denise DuVernay, who has participated in Saint Xavier's Catholic spring break programs;
- James Steyskal, who has participated in Saint Xavier's Catholic spring break programs;
- Dannis Matteson, who has participated in Saint Xavier's Catholic spring break programs;

- David Neff, who was on the original Excelsior List and who has been active in the Interfaith Expo, Saint Xavier’s Catholic Colloquium series, and the Stations of the Cross Catholic prayer forum;
- Daniel Olsen, who was on the original Excelsior List and who participates in Saint Xavier’s Catholic Colloquium series and teaches graduate students in the Pastoral Ministry Institute;
- Tammy Bobel, who was on the original Excelsior List and who presented at a recent Pub Discourse;
- James Rabbitt, who was on the original Excelsior List and who helped design the Bishop John Gorman Institute for Catholic Educational Leadership; and
- Laura Shallow, a Mercy Associate who was on the original Excelsior List and who actively brings religious perspectives into her business courses.

This list is significant, but not exhaustive, and it would be impossible some four years after the petition was filed, when most of the faculty members in the proposed unit no longer work at Saint Xavier,²³ to determine how specific faculty members at the time of the election participated in religious programming, brought Catholic theology into their classrooms, or performed some other specific religious function. However, since there is no way to now segregate 2011 votes on the basis of the voters’ specific religious functions, the only remedy is for the Board to order a new election.

It is standard procedure that challenged votes should be segregated before impounding “as the validity of such ballots might be affected by a final Board determination.” NLRB Casehandling Manual, Part 2, Representation Proceedings, §§ 11280.3, 11302.1(a) (September 2014). This procedure was not followed in the 2011 election since, at that time, the Board had not decided *PLU* and Saint Xavier had no reason or occasion to challenge or segregate individual

²³ Only 51 adjunct faculty members remain of the 132 identified on the Excelsior list at the time the election was held. (Er. Ex. 61.)

votes based on the particular religious mission of individuals who indisputably perform a specific religious function. Thus, absent a mechanism to link votes with their voters, the election must be deemed invalid and a new election held.²⁴ See *Grace Line, Inc.*, 4 NLRB 763, 764 (1938) (failure to segregate ballots that might have materially affected the results of an election deemed grounds for a new election); *W. Union Telegraph Co.*, 38 NLRB 483, 486 (1942) (absent method to ascertain whether ballots were cast by persons subsequently declared ineligible, a new election was required). In summary, Saint Xavier has been prejudiced not only by the *ex post facto* application of the new *PLU* test, but also by the Board's unusual delay in revisiting its jurisdiction over religiously identified colleges and universities, as it was deprived of the opportunity to challenge votes of those who performed a specific religious function at the time of the 2011 election. The only possible way at least partially to remedy this situation would be to hold a new election among the current adjunct faculty in the proposed bargaining unit.

²⁴ A new election would have the additional benefit of accounting for the substantial turnover in employees in the petitioned-for unit.

CONCLUSION

For the foregoing reasons, the Board should discard its unconstitutional *PLU* Test in favor of the *Great Falls* Test. However, if the Board continues to apply *PLU*, it should decline to exercise jurisdiction over the petitioned-for unit even under that test. In the alternative, the Board should order a new election so that Saint Xavier may challenge the votes of current adjunct faculty members on the basis of their specific religious functions.

Dated: June 15, 2015

HOGAN LOVELLS US LLP

By: /s/ Stanley Brown

Stanley Brown

David Baron

875 Third Avenue

New York, New York 10022

Telephone: (212) 918-3000

Facsimile: (212) 918-3100

stanley.brown@hoganlovells.com

Attorneys for Employer Saint Xavier University